

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC.;
LIGHTHOUSE PRODUCTS, LLC; LHR
INFRASTRUCTURE, LLC; LHR COAL,
LLC; and MILLENNIUM BULK
TERMINALS-LONGVIEW, LLC,

Plaintiffs,

v.

JAY INSLEE, in his official capacity as
Governor of the State of Washington; MAIA
BELLON, in her official capacity as
Director of the Washington Department of
Ecology; and HILARY S. FRANZ, in her
official capacity as Commissioner of Public
Lands of the State of Washington,

Defendants.

Case No. 3:18-CV-05005-RJB

**INTERVENOR-PLAINTIFF BNSF
RAILWAY COMPANY'S STATUS
CONFERENCE STATEMENT**

BNSF Railway Company ("BNSF") submits this statement regarding scheduling matters ahead of the April 10, 2018 status conference. BNSF provides this statement to aid the Court's case administration, considering the interplay between BNSF's intervention and the current motion to dismiss scheduling. BNSF suggests that the Court consolidate the motion to dismiss briefing schedule to ensure efficiency while also accounting for the nature of all parties' participation in the case so far and to avoid any future dispute regarding the same.

Background

On February 22, 2018, State Defendants filed a Motion for Partial Dismissal Under Eleventh Amendment and FRCP 12(b)(6) and Motion for Abstention (“Motion”) (Dkt. 20) against the complaint of the Plaintiffs who brought this case (“Lighthouse”). Five days later, BNSF moved to intervene as a plaintiff (Dkt. 22), and the Washington Environmental Council and others as moved to intervene as defendants (collectively “WEC”) (Dkt. 24). Along with its motion to intervene, BNSF filed a complaint in intervention (Dkt. 22-1). And along with WEC’s motion to intervene, it filed a simple joinder to the Motion (24-1).

Before briefing was complete on the intervention motions, the Court granted a stipulated motion filed by Lighthouse and State Defendants (Dkt. 31) to extend the briefing schedule for the Motion. Now, Lighthouse’s opposition to the Motion is due April 12, 2018 and State Defendants’ reply in support of the Motion is due April 20, 2018.

About three weeks later, after briefing on intervention had closed, the Court granted BNSF’s motion to intervene and partially granted WEC’s motion to intervene (Dkts. 47 & 48). Neither State Defendants nor WEC have filed an answer to or defensive motion against BNSF’s complaint in intervention.

Separately, on March 26, 2018 and at about the same time it granted BNSF’s, and partially granted WEC’s, intervention, the Court granted a stipulated motion by State Defendants and Lighthouse to extend initial discovery deadlines by 30 days (Dkt. 46). Three days later, considering BNSF’s intervention and WEC’s partial intervention, all parties jointly moved for a status conference (Dkt. 49). The Court granted that stipulated motion and set a status conference for Tuesday April 10, 2018 at 9:30am PDT.

BNSF’s Initial Proposal on the Motion’s Briefing Schedule

Currently, the Motion only addresses Lighthouse’s complaint. The Motion does not, for example, address BNSF’s unique foreign affairs claim or other unique aspects of its complaint. Nor have State Defendants or WEC filed any responsive pleadings to or defensive motions against BNSF’s complaint in intervention that would address the unique aspects of

BNSF's complaint in intervention.¹ The Motion's resolution will not be effective as to parties against whom the Motion was not directed. Instead, State Defendants and WEC will have to file either an answer to or a defensive dismiss against BNSF's complaint. If the Court maintains the current briefing schedule for the Motion, that would fork the proceedings at the pleading stage and create duplicative, staggered briefing regarding the same. BNSF believes this is unnecessary and inefficient. Consolidating the pleading stage's schedule would avoid this result and preserve efficiency.

At the status conference, BNSF will propose that the Court slightly shift the Motion's current briefing schedule to allow (1) the State Defendants and WEC to file an amended motion to dismiss that accounts for BNSF's complaint (should they choose to file one instead of a responsive pleading) and (2) reasonable deadlines that would allow Lighthouse and BNSF to oppose any amended motion to dismiss. Accordingly, BNSF plans to propose:

- State Defendants and WEC file an amended motion to dismiss within fourteen days of the Status Conference – April 24, 2018;²
- Lighthouse and BNSF file separate oppositions to any amended motion to dismiss not later than fourteen days after the due date for Defendants motion – May 8, 2018;
- State Defendants and WEC file a reply brief not later than seven days after the due date for Lighthouse's and BNSF's opposition briefs – May 15, 2018.³

¹ No responsive pleading to or defensive motion against BNSF's complaint would be due before the April 10 status conference. Such a due date, however, is ambiguous. If BNSF's complaint is deemed filed and served upon its intervention (March 26, 2018), then the due date for any responsive pleading to or defensive motion against BNSF's complaint would be April 16, 2018. Alternatively, if State Defendants' waiver of service as to Plaintiffs applies to BNSF as of the date of BNSF's intervention, then the due date would be May 25, 2018.

² BNSF recognizes that separate parties ordinarily would file separate answers to or defensive motions against separate complaints. Here, however, WEC has already filed a simple joinder to the Motion (Dkt 24-1), and the Court granted WEC's intervention (Dkt. 48) in part. Assuming the State Defendants and WEC plan to file a defensive motion against BNSF's complaint instead of an answer, BNSF knows of no changed circumstances that would warrant WEC's filing a separate amended motion to dismiss and reply in support thereof, unless WEC would disagree with the State's new arguments as to BNSF's complaint. In that event, WEC should only be allowed to file its own amended briefing to the extent it would differ from the State's arguments against BNSF's complaint.

BNSF's Position on Discovery Scheduling

Currently, BNSF proposes no extension to the initial discovery and joint status report deadlines that resulted from the Court's March 26, 2018 Order (Dkt. 46).

Conclusion

BNSF remains committed to moving this case along efficiently. The current briefing schedule for the Motion, however, runs counter to an efficient course, because it creates separate tracks at the pleading stage as to Lighthouse on the one hand and BNSF on the other. Accordingly, BNSF will propose at the status conference that the Court slightly extend the current briefing schedule for the Motion while pulling back the responsive deadlines for an answer to or defensive motion against BNSF's complaint. This would resolve any efficiency issues for the pleading stage and avoid any future dispute regarding the effect of the Court's resolution of the Motion.

³ BNSF's prefers this unified briefing schedule, because it is reasonable and would move this case along efficiently. BNSF recognizes, considering the ambiguity mentioned in footnote 1, that State Defendants' and WEC's responsive pleading to or defensive motion against BNSF's Complaint may not be due until May 25, 2018. If the Court determines that May 25, 2018 is the due date for any responsive pleading to or defensive motion against BNSF's complaint, BNSF would discuss alternative, unified briefing schedule possibilities, following a similar series of dates – State Defendants' and WEC's amended motion to dismiss would be due on some date before May 25th, Lighthouse's and BNSF's separate opposition briefs would be due fourteen days later, and any reply brief would be due seven days after that.

1 DATED April 9th, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 9th, 2018, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to all counsel of record.

DATED: April 9th, 2018

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